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No. 92-351

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEONARD E. HELLER, Secretary,
KENTUCKY CABINET FOR HUMAN
RESOURCES - - - - - - - - Petitioner

versus

SAMUEL DOE, by His Mother and
Next Friend, MARY DOE, Et Al. - Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

WILLIAM K. MOORE
Counsel of Record
P.O. Box 4217
Midway, Kentucky 40347
Telephone: (606) 846-4431

MASTEN CHILDERS II, Commissioner
EDWARD D. KLATTE
CHARLES P. LAWRENCE
Department of Law
Cabinet for Human Resources
275 East Main Street – 4 West
Frankfort, Kentucky 40621
Telephone: (502) 564-7900
Counsel for Petitioner

December 8, 1992

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. CHR's admission of mentally retarded adults to its ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection.

2. Kentucky's utilization of the "clear and convincing" standard of evidence for the involuntary hospitalization of the mentally retarded and the "beyond a reasonable doubt" standard for involuntary hospitalization of the mentally ill does not violate Equal Protection.

3. Involuntary hospitalization procedures which permit a mentally retarded person's immediate family or legal guardian to participate in the proceedings as though a party therein do not deprive the mentally retarded person of his right to Due Process of Law.

4. Sufficient differences exist between the mentally retarded and the mentally ill to constitutionally permit a State to adopt procedures which permit the immediate family and legal guardians of mentally retarded persons to participate in involuntary hospitalization proceedings for the mentally retarded without adopting procedures for the immediate family and legal guardians of mentally ill persons to participate as parties in involuntary hospitalization proceedings for the mentally ill.

LIST OF PARTIES

The petitioner in this proceeding is Leonard E. Heller, Secretary of the Kentucky Cabinet for Human Resources.

The respondents in this proceeding are Samuel Doe (a fictitious name), by and through his mother and next friend, Mary Doe, on his own behalf and as the representative of a class consisting of all mentally retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution, or other mental retardation residential treatment center involuntarily on the basis of their condition of mental retardation and who contend that said involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution, 29 U.S.C. § 794, and Kentucky Revised Statutes Chapters 202A, 202B, 210 and 31.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

Now comes petitioner, Leonard E. Heller, Secretary of the Kentucky Cabinet for Human Resources, and for his Brief in the above-styled proceeding, states as follows:

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported *sub nom. Doe* v, *Cowherd* at 965 F.2d 109 (6th Cir. 1992) and is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 1a-7a and in the Joint Appendix at Page 171-177.

The Memorandum Opinion and Preliminary Injunction of the United States District Court for the Western District of Kentucky from which the most recent appeal was taken is reported *sub nom. Doe* v, *Cowherd* at 668 F.Supp. 597 (W.D.KY 1991) and is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 8a-18a and in the Joint Appendix at Page 160-170. This Memorandum Opinion was the fourth Opinion of the United States District Court in these proceedings.

The United States Court of Appeals for the Sixth Circuit has previously entered an Opinion in this matter that is reported *sub nom. Doe* v, *Austin* at 848 F.2d 1386 (6th Cir. 1988). This opinion is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 19a-38a and in the Joint Appendix at Page 90-109.

The third Opinion of the United States District Court for the Western District of Kentucky is reported *sub nom. Doe* v, *Austin* at 663 F.Supp. 597 (W.D.KY 1986) and is reprinted in the Appendix to the Petition for Writ of Certiorari at Page 40a-48a and in the Joint Appendix at Page 79-87.

The second Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is reprinted in the Appendix to the Petition for Certiorari at Page 51a-59a and in the Joint Appendix at Page 64-74.

The initial Opinion of the United States District Court for the Western District of Kentucky is not reported. The decision is reprinted in the Appendix to the Petition for Certiorari at Page 60a-72a and in the Joint Appendix at Page 49-63.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 1, 1992. The petition for writ of certiorari was filed on August 26, 1992 and was granted on October 19, 1992. 113 S.Ct. 373 (1992). The jurisdiction of this Court to review the Opinion of the Sixth Circuit rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1983: Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Amendment XIV, United States Constitution, Section 1: Citizenship; Due Process; Equal Protection.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a class action brought on behalf of all mentally retarded persons in Kentucky who have been admitted or face admission to the intermediate care facilities for the mentally retarded administered by the Kentucky Cabinet for Human Resources (CHR). The issues addressed below concern under what circumstances a mentally retarded person could be voluntarily admitted by himself or his legal guardian to a state operated facility and what proceedings were required for an involuntary admission. The decisions below addressed the admission procedures in effect in 1982 when the complaint was filed and the procedures adopted by the Kentucky General Assembly in response to this litigation in 1986 and 1990.

Petitioner, Leonard E. Heller[1], is the chief executive and administrative officer of CHR. CHR is the state administrative agency which operates Kentucky's programs for the mentally retarded, including the Commonwealth's four intermediate care facilities for the mentally retarded (ICF/MR's)[2]. Through these facilities, formerly called mental retardation residential treatment centers, CHR provides habilitative services and training in basic living skills to the mentally retarded in a residential setting.

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[1]Harry J. Cowherd, appellant below, resigned from his position as Secretary of CHR effective December 29, 1991 and was succeeded in office by Leonard E. Heller. Pursuant to F.R.Civ.P. 25(d)(1), Leonard E. Heller has automatically been substituted as the interested party in this action.

[2]These facilities are Outwood ICF/MR located at Dawson Springs, Kentucky; Oakwood ICF/MR located at Somerset, Kentucky; Hazelwood ICF/MR located at Louisville, Kentucky; and Central State ICF/MR also located at Louisville, Kentucky.

Respondent, Samuel Doe, is a severely retarded adult who was a resident of one of CHR's intermediate care facilities for the mentally retarded at the commencement of this action in 1982. (Trial Record, hereafter R., 3, p. 5). Samuel Doe was admitted to Outwood ICF/MR as a "voluntary" admission upon application of his mother, Mary Doe, who is also his legal guardian and his next friend in this proceeding. (R. 3, p. 5). CHR has no knowledge of whether Samuel Doe remains an Outwood resident or whether he was discharged to a community residential placement by the facility staff or whether he was withdrawn from Outwood by his legal guardian because respondents have utilized fictitious names since the commencement of this action.

In order to understand what it means to say that someone is "severely retarded", a definition of the term and description of the various levels of retardation is required.

The most widely accepted definition of mental retardation was formulated by the American Association on Mental Deficiency (AAMD) in 1973 as follows:

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Hughes, *Definition, Diagnosis, Classification and Associated Problems in Mental Retardation*, Law & Psychology Review, Spring, 1975, p. 17.

The AAMD's definition of mental retardation was adopted by the Kentucky General Assembly in Kentucky Revised Statute (KRS) 202B.010. (R. 34, p. 17).

An important feature of both the AAMD and Kentucky definitions of mental retardation is the dual criterion of deficits in both adaptive behavior and intellectual func-

tioning. Adaptive behavior refers to the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group. Hughes, *supra.*, p. 18. Thus, an individual with an IQ of 60 who demonstrated no significant impairment in adaptive behavior would not be considered mentally retarded. Hughes, *supra.*, p. 18.

The AAMD recognizes four levels of retardation measured by the degree of disability. The levels of retardation and the corresponding levels of intelligence, as measured by standardized general intelligence tests, and deviation in adaptive behavior are as follows:

Level of Retardation	Level of Deviation in Measured Intelligence	Corresponding IQ Range		Level of Deviation in Adaptive Behavior
		Stanford-Binet	Wechsler	
Mild	–2	52-68	55-59	–2
Moderate	–3	36-51	40-54	–3
Severe	–4	20-35	25-39	–4
Profound	–5	Below 20	Below 25	–5

Hughes, *supra.*, p. 21; (R. 34, p. 19).

A person with severe mental retardation generally functions at a level comparable with that of a normal two to three year old child. A profoundly retarded person generally functions at the level of a nine to twelve month old infant. (R. 36, p. 84).

There were 769 residents in CHR's four intermediate care facilities for the mentally retarded in 1985 (the most recent figures available in the record below). (R. 114, p. 1). The vast majority of these residents were severely or profoundly retarded. The typical resident of Hazelwood ICF-MR is profoundly retarded, nonverbal, nonambulatory, has no independent self-help skills, is not toilet trained and tends toward self-stimulation (i.e. self abuse). (R. 69, pp. 4-5). Mildly or moderately retarded individuals must have concomitant severe behavior problems or a substantial physical disability to satisfy CHR's admission criteria. (R. 36, p. 72).

At the time this action commenced, nearly all residents in CHR's ICF/MR facilities, including respondent Samuel Doe, had been admitted under CHR's "voluntary" admission procedures. The voluntary procedure was initiated by an application for admission filed by the parent of a minor or the legal guardian of an adult through one of the state's Community Mental Health Centers. (R. 36, pp. 12-13). The application required the Director of the Community Mental Health Center to certify that the needs of the mentally retarded person could not be met by services available in the community. (R. 73, p. 44). The application was accompanied by a psychological evaluation of the applicant; the applicant's school records; and the individual habilitation plans developed for the applicant by the Community Mental Health Center in its unsuccessful effort to provide services to the applicant in the community. (R. 36, p. 13).

The application and accompanying records were submitted to a CHR Record Review Committee which consisted, at a minimum, of a physician, a psychologist, a social worker, a registered nurse and a licensed practical nurse. (R. 36, pp. 11-12).

The factors considered by the Records Review Committee in determining whether to grant the application for admission included: (1) the availability of appropriate alternative residential and training programs in the community; (2) the availability of an appropriate place within an ICF/MR; (3) the severity of the applicant's retardation; (4) the status of the applicant's family situation; (5) the

applicant's developmental history; (6) all previous efforts to provide services to the applicant; and (7) the applicant's need for basic services such as toilet training, basic survival skills, physical therapy and occupational therapy. (R. 36, pp. 19-21).

If the Records Review Committee determined that the applicant was appropriate for admission to an ICF/MR, the Committee then determined which facility was most appropriate for the applicant's needs. (R. 36, pp. 21-22).

If the applicant was a minor, admission to an ICF/MR following approval of the Records Review Committee could be made upon consent of the applicant's parents. If, however, the applicant was an adult, admission required the consent of the applicant's legal guardian. CHR considered such admissions "voluntary" and did not require the applicant's legal guardian to institute the judicial procedures for involuntary hospitalization set forth in KRS Chapter 202B. The adult applicant voluntarily admitted under these procedures could leave of his own volition or upon request for removal by his legal guardian. (R. 36, p. 27).

A guardian has specifically authority under state law to take custody of his ward and to establish his place of abode within the state, KRS 387.660(1), and to give any necessary consent or approval to enable his ward to receive medical or other professional care, counsel, treatment or service except for certain specified medical procedures. KRS 387.660(3). The guardian has specific duties to make provision for his ward's care, comfort and maintenance and to arrange for such educational, social, vocational and rehabilitation services as are appropriate and will assist his ward in the development of maximum self-reliance and

independence. KRS 387.660(2). A guardian must act with respect to his ward in a manner which limits the deprivation of his ward's civil rights and restricts his ward's personal freedom only to the extent necessary to provide needed care and services to the ward. KRS 387.660(4).

If a guardian should place his ward in a residential facility, the guardian must notify the state district court of such placement within thirty days. KRS 387.660(1). This notice must include: (1) the specific reasons for such placement; (2) an inter-disciplinary evaluation report detailing the social, psychological, medical or other considerations upon which the placement was predicated; (3) a description of the treatment or habilitation programs which will benefit his ward as a result of such placement; and (4) a determination that such placement will provide the ward with appropriate treatment in the least restrictive setting. KRS 387.660(1).

At least annually, a guardian must file a verified report with the state district court describing: (1) his ward's current mental, physical and social condition; (2) the addresses of every residence of his ward during the reporting period and the length of stay at each residence; (3) a summary of the medical, social, educational, vocational, and other professional services received by his ward during the reporting period; (4) an outline of the guardian's visits with and activities on behalf of his ward; (5) a recommendation as to the need for continued guardianship; and (6) such other information as may be requested by the court. KRS 387.670(1). Upon review of such reports, the state district court may take whatever action it considers necessary to enhance the well-being of the ward. KRS 387.670(3).

Placement of a mentally retarded person in a residential facility is not viewed by CHR as a permanent place-

ment. (R. 36, pp. 15, 64). An inter-disciplinary team composed of the facility staff responsible for providing treatment and habilitation services to the residents conducts staffing monthly to assess each resident's need to remain at the facility. (R. 36, p. 30).

Neither respondent Samuel Doe nor his mother requested that he be discharged from Outwood; however, on October 25, 1982, respondents filed a complaint against the Secretary of CHR in the U. S. District Court for the Western District of Kentucky alleging that Samuel Doe, and the class he proposed to represent, was being involuntarily confined at Outwood without a precommitment judicial determination as required by KRS Chapter 202B and the Due Process and Equal Protection Clauses of the United States Constitution. (R. 3, p. 2). Respondents sought declaratory and injunctive relief under 28 U.S.C. §§2201 and 2202 and 42 U.S.C. §1983 to enjoin the Secretary from admitting persons to CHR's ICF/MR facilities without certain precommitment procedural safeguards, including the rights to notice, jury trial, counsel and postcommitment periodic judicial review. (R. 3, p. 13).

The preadmission and postadmission rights sought by Samuel Doe were available to persons involuntarily hospitalized at a CHR mental retardation facility by a judicial proceeding instituted under KRS 202B.050. This statute incorporated by reference all rights and procedures provided in the involuntary hospitalization of the mentally ill under KRS Chapter 202A. However, at the time of Samuel Doe's admission, less than 1% of the ICF/MR residents had been admitted on an involuntary basis. (R. 37, p. 22).

The District Court denied CHR's motion to dismiss, (R. 47) and certified a plaintiff class consisting of all mentally

retarded persons in the Commonwealth of Kentucky who are presently committed or who may in the future be subjected to being committed to a state hospital, institution or other mental retardation residential treatment center involuntarily on the basis of their condition of mental retardation and who contend that their involuntary commitment violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, 29 U.S.C. § 794, and KRS Chapters 202A, 202B, 210 and 31. (R. 60).

After the initial round of discovery, Samuel Doe moved for summary judgment on the issues presented in his complaint. (R. 76). The District Court entered Findings of Fact, Conclusions of Law and a Memorandum Opinion on March 28, 1984 which described the admissions procedures utilized by CHR and found that such procedures were consistent with the admissions procedures approved in *Parham* v, *J.R.*, 442 U.S. 524, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) and its companion case of *Secretary of Public Welfare* v, *Institutionalized Juveniles*, 442 U.S. 640, 99 S.Ct. 2523, 61 L.Ed.2d 142 (1979). (R. 106, pp. 10-12). The District Court also found, however, that CHR had been pressured by some parents not to release their children from ICF/MR facilities and that such parental veto[3] was in violation of *Parham*, supra. (R. 106, p. 17).

CHR then moved for summary judgment to dismiss Doe's claims concerning CHR's voluntary admission procedures. (R. 111). Samuel Doe contemporaneously moved

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[3]The parental veto practice was required by federal regulations governing the funding of health care services to residential and community placements. 42 CFR § 441.302(d) required that if a Medicaid recipient is determined eligible for ICF/MR placement, the recipient *or his legal guardian* must be "given the choice of either institutional or home and community-based services."

the District Court to reconsider the rulings contained within its Memorandum Opinion. (R. 113).

On January 9, 1986, the District Court entered its second Memorandum Opinion in which it reaffirmed its initial decision that CHR's voluntary admission procedures did not violate procedural due process. (R. 117, pp. 2, 5). However, the District Court found that admission of a mentally retarded person to an ICF/MR by his legal guardian could not be considered a "voluntary" admission because the ward lacked the capacity to consent to such admission and that all such admissions must be considered "involuntary." (R. 117, p. 3).

The District Court observed that KRS Chapter 202B required the same judicial proceedings be utilized prior to "involuntary" hospitalization of the mentally retarded as were utilized prior to involuntary hospitalization of the mentally ill and determined that Kentucky had legislatively determined that the two groups were similarly situated and entitled to the same procedural safeguards. (R. 117, pp. 4-5). The District Court then held that CHR's failure to provide the precommitment judicial procedures contained in KRS Chapter 202A prior to the admission of the mentally retarded to its facilities while providing judicial procedures prior to involuntary hospitalization of the mentally ill was a denial of equal protection. (R. 117, pp. 8-12).

The District Court recognized that mildly or moderately retarded persons could voluntarily admit themselves to an ICF/MR (R. 117, p. 9), but enjoined CHR from making any other admissions to its ICF/MR facilities unless the admissions were made under the statutory involuntary hospitalization procedures. (R. 118).

The 1986 Kentucky General Assembly responded to the District Court's interpretation of KRS Chapter 202B with certain amendments to that Chapter contained in House Bill 477 (1986 Kentucky Acts, Chapter 79). The amendments specified that the application by parents or guardians for placement of their child or ward in a mental retardation treatment center pursuant to the Records Review Committee procedure was not an "involuntary" commitment under KRS Chapter 202B. (R. 120, Appendix to Memorandum at p. 1-6).

Samuel Doe moved the District Court to enter summary judgment declaring that the 1986 legislation was unconstitutional and to enjoin its enforcement. (R. 120). CHR moved the District Court to reconsider its January 9, 1986 Opinion in light of the new legislation. (R. 121).

In its third Memorandum Opinion, the District Court observed that House Bill 477 effectively eliminated the rights of mentally retarded persons to a judicial hearing prior to commitment to an ICF/MR and that most admissions would be considered voluntary under the Act. (R. 126, p. 2). *Doe* v. *Austin*, 668 F.Supp. 597 (W.D. KY 1986). The District Court again observed that an admission to an ICF/MR by a guardian without the consent of the ward cannot be considered a "voluntary" admission, (R. 126, p. 6), and held that the admission procedures contained in the new act violated both Equal Protection and Due Process. (R. 126, pp. 7-8).

The District Court enjoined CHR from admitting any mentally retarded person over 18 years of age to its ICF/MR facilities without instituting prior judicial proceedings for involuntary hospitalization and from continuing to confine any mentally retarded person at such facilities who

reached 18 years of age without instituting involuntary hospitalization proceedings. (R. 127, pp. 1-2).

CHR appealed the preliminary injunction to the Sixth Circuit Court of Appeals. The Sixth Circuit agreed with the District Court that admissions of mentally retarded adults to ICF/MR's must be considered involuntary admissions which are subject to due process safeguards. *Doe* v, *Austin*, 848 F.2d 1386, 1392 (6th Cir. 1988). The Sixth Circuit held that the minimal procedural safeguards which must be provided prior to admission to a state operated ICF/MR are the same as those set forth for the transfer of a convicted felon to a state mental hospital in *Vitek* v, *Jones*, 445 U. S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). Those procedures are:

1. Written notice to the prisoner that a transfer to a mental hospital is being considered;
2. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
3. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the State;
4. An independent decisionmaker;
5. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate; and
6. Qualified and independent assistance must be provided to the inmate. *Doe* v, *Austin*, *supra.*, at 1393.

The Sixth Circuit disagreed with the trial court that Due Process required a judicial forum for the exercise of the required procedures; but agreed that Equal Protection

required a judicial forum. The Sixth Circuit reasoned that Kentucky had legislatively declared the mentally retarded and the mentally ill were similar classes of persons by providing the same statutory procedures for their involuntary hospitalization, and that CHR did not demonstrate a basis for distinguishing between the two groups

that was rationally related to their involuntary confinement. *Id.* at 1396. The Sixth Circuit reversed the District Court's decision as it related to Due Process and remanded the case for further proceedings.

CHR's petition for rehearing and rehearing en banc was denied on August 3, 1984. CHR's petition for writ of certiorari from the initial Opinion of the Sixth Circuit in this matter was also denied. 488 U.S. 967, 109 S.Ct. 495 (1988).

Following remand, the District Court directed the parties and *amicus* (parents and legal guardians of Doe's class) to attempt to draft a compliance plan that would implement the decision of the Sixth Circuit. (R. 161). It was anticipated by all parties that changes in state law would be required to implement the new admissions procedures.

While the parties were waiting for the District Court to act upon a tendered Agreed Compliance plan, the 1990 Kentucky General Assembly enacted sweeping revisions to KRS Chapter 202B in 1990 Kentucky Acts, Chapter 147 (denominated House Bill 511 in the opinions below). (R. 210, Exhibit 1).

The new legislation was a complete revamping of KRS Chapter 202B which incorporated many of the revisions to the Chapter required by the tendered Compliance Plan and also addressed other matters not specifically provided for in the Plan.

Samuel Doe moved the District Court to declare that numerous sections of the new legislation were unconstitutional and to enjoin enforcement of those sections. (R. 201).

In a Memorandum Opinion entered July 1, 1992, the District Court agreed with Doe regarding the following Sections of the new legislation:

A. Section 4(3) of House Bill 511, now codified as KRS 202B.021, which required an ICF/MR to discharge any voluntary patient[4] whose treatment and care in an ICF/MR was no longer necessary or advisable, was held unconstitutional to the extent it "governs release of voluntarily admitted adults without any reference to such resident's right to release upon request"; (R. 215, pp. 8-9).

B. Section 15(2) of House Bill 511, now codified as KRS 202B.160(2), which authorized commitment of mentally retarded persons upon the clear and convincing standard of evidence, was found to violate the Equal Protection Clause; and (R. 215, p. 11).

C. Sections 13, 15(3) and 22 of House Bill 511, now codified as KRS 202B.140, 202B.160(3) and 202B.230, which permitted the parents and legal guardians of mentally retarded persons to participate in all aspects of the involuntary commitment proceedings as if parties, were found to violate both the Equal Protection and Due Process Clauses. (R. 215, p 11-12). *Doe* v, *Cowherd*, 668 F.Supp. 597 (1991).

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[4]Section 4(2) of House Bill 511 permitted mildly or moderately retarded adults to voluntarily admit themselves to an ICF/MR provided a facility physician first determined that the mentally retarded person possessed sufficient mental capacity to provide his informed consent to the admission.

All other challenged Sections of House Bill 511 were found to adequately protect the constitutional rights of the mentally retarded. A preliminary injunction was entered to enjoin enforcement of the sections found unconstitutional by the District Court. (R. 216).

CHR again appealed the preliminary injunction to the Sixth Circuit Court of Appeals. (R. 217). No cross appeal was taken.

The Sixth Circuit agreed with CHR that the issue of the constitutionality of the mandatory release of the few remaining voluntary ICF/MR residents did not present a case or controversy and reversed the District Court on that issue. No proof was presented that any voluntary patient had ever been denied release and CHR had stipulated in the proceedings before the District Court that voluntary patients had the right to release upon request. *Doe* v, *Cowherd*, 965 F.2d 109, 112 (6th Cir. 1992).

The Sixth Circuit then addressed the standard of evidence which must be utilized for involuntary commitment of the mentally retarded. The standard adopted in House Bill 511 was the "clear and convincing" standard. However, KRS Chapter 202A required satisfaction of the "beyond a reasonable doubt" standard in proceedings for the involuntary hospitalization of the mentally ill. The Sixth Circuit found that there were no differences between the two classes for the purposes of their commitment which are relevant to the Due Process they are entitled to receive and affirmed the District Court's holding that Kentucky's utilization of the "clear and convincing" standard for involuntary commitment of the mentally retarded was a violation of Equal Protection. *Id.* at 112.

The Sixth Circuit also affirmed the District Court's holdings with regard to participation of the mentally retarded person's parents and guardian in the commitment proceedings. The Court observed that these individuals may have an interest that is adverse to the interests of the person facing commitment and their participation imposed a greater burden on the mentally retarded than that placed upon mentally ill adults facing involuntary hospitalization. *Id.* at 113.

CHR then sought relief from the decision of the Sixth Circuit through its petition to this Court for writ of certiorari.

SUMMARY OF ARGUMENT

Parham v, *J. R.*, 442 U. S. 524, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) and *Secretary of Public Welfare* v, *Institutionalized Juveniles*, 442 U. S. 640, 99 S.Ct. 2523, 61 L.Ed.2d 142 (1979) upheld against Due Process challenge the admissions procedures of state mental hospitals which permitted parents and legal guardians of minors to substitute their consent for that of their child or ward to voluntary admission at such facilities provided the admission was reviewed and approved by a hospital physician.

Parham and *Institutionalized Juveniles* reached this result by balancing (i) the interests of the parents and legal guardians in obtaining necessary medical services for their children and wards; (ii) the children's liberty interest and their interest in receiving necessary medical treatment; (iii) the State's interest in providing necessary medical services to those in need of such services in a prompt and economical fashion without imposing complex and unnecessary procedural burdens upon the receipt of such services and (iv) the procedural safeguards provided by the

medical decisionmaking model and the likelihood that other procedures would decrease the risk of erroneous decisions.

Parham and *Institutionalized Juveniles* held that the medical decisionmaking model was better suited for decisions to admit children in need of psychiatric services to state mental hospitals than the judicial decisionmaking model because the questions addressed were basically medical in character.

Balancing the factors described in *Parham* and *Institutionalized Juveniles* in the very similar situation presented when, subject to the review and approval of State mental retardation professionals, a legal guardian of a mentally retarded adult seeks necessary habilitation services for his ward from a State residential facility for the mentally retarded should likewise result in approval of the medical decisionmaking model for voluntary receipt of such services.

2. When, however, it becomes necessary for a State to seek authorization to provide habilitation services to a mentally retarded person which are opposed by the mentally retarded person or his legal guardian, the State should be permitted to establish the necessary prerequisites for the involuntary provision of such services by the "clear and convincing" standard of evidence even if the State requires the higher criminal standard in proceedings to involuntarily confine mentally ill persons to its state mental hospitals.

The "clear and convincing" standard of evidence was determined by this Court in *Addington* v, *Texas*, 441 U. S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) to be the appropriate standard for civil commitments and the "beyond a reasonable doubt" standard of evidence was found to be inappropriate.

The Equal Protection Clause does not require that the mentally retarded be penalized by an inappropriate standard of evidence in their involuntary commitment proceed-

ings simply because a State has improvidently required the inappropriate criminal law standard for its mentally ill. Moreover, sufficient differences exist between the mentally retarded and the mentally ill to provide a state legislative body with a rational basis for establishing different evidentiary standards for their respective involuntary commitment to State facilities for necessary services.

3. In the establishment of the procedures by which mentally retarded persons may be involuntarily compelled to receive State services, the States are free to develop such procedures as are not inconsistent with Due Process. Procedures which permit the persons who are immediately responsible for health and welfare of the mentally retarded person to participate directly in the involuntary commitment process do not impose an undue burden upon the retarded. At most, participation of such additional interested parties insures that the trier-of-fact will be presented with all necessary, available and relevant evidence before making the decision regarding involuntary commitment.

4. Sufficient differences exist between the mentally retarded and the mentally ill to provide a rational basis for a state legislature to prescribe involuntary commitment procedures for the mentally retarded which permit the retarded person's immediate family and legal guardian to participate in such proceedings as though a party thereto even though the immediate family and legal guardians of the mentally ill are not permitted to participate in proceedings for involuntary commitment of the mentally ill to state mental hospitals.

ARGUMENT

1. CHR's admission of mentally retarded adults to its ICF/MR facilities as voluntary residents upon the substituted consent of their legal guardians and after independent professional review does not violate either Due Process or Equal Protection.

Kentucky finds itself in this unenviable position because the District Court and Sixth Circuit have refused to

apply the rulings of this Court in *Parham* v, *J. R.*, 442 U.S. 524, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) and *Secretary of Public Welfare* v, *Institutionalized Juveniles*, 442 U.S. 640, 99 S.Ct. 2523, 61 L.Ed.2d 142 (1979) to the admission of adults to residential facilities for mental retardation. CHR respectfully requests the Court to extend these previous rulings to the situation presented in the case at bar for the benefit of the mentally retarded, their families, and the state administrators who are charged with the responsibility of administering programs for the mentally retarded.

In *Parham*, this Court provided an approach for testing challenged state procedures under a Due Process claim which required the balancing of (a) the private interest that will be affected by the official action; (b) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (c) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 442 U. S. at 599-600.

A. The following factors must be balanced under *Parham*.

(1) Private Interests.

The private interests affected by state action in the case at bar are very similar to those described in *Parham* at 442 U. S. 600. The first of these interests is the interest of a mentally retarded adult to specialized type of care called habilitation. *Philadelphia Police and Fire Assoc. for Handicapped Children, Inc.* v, *City of Philadelphia*, 874 F.2d 156 (3rd. Cir. 1989) described this care as:

> The mentally retarded require special and continuing care called "habilitation" to function optimally in

> society. Habilitation entails "teaching and training the retarded basic life and social skills" such as walking, talking, eating, toileting, socializing, using money, traveling and working. Those lessons, however, are not learned permanently by mentally retarded persons: once habilitation ceases, they begin to regress. *Id.* at 158.

Adults suffering from severe and profound mental retardation who function in society at the level of young children have the same interests in being cared for as do children. Mentally retarded adults also have a liberty interest in not being unnecessarily restricted by the provision of habilitation services.

Parents and legal guardians of the mentally retarded have important interests at stake. Since ninety-seven or ninety-eight percent of the retarded reside in the community outside of an institutional setting, (R. 34, p. 28), the role of care-giver and care-provider for the retarded has traditionally fallen upon the mentally retarded person's parents or immediate family. Such care was demonstrated by *amicus* below.[5]

The role of the family continues after a mentally retarded adult leaves his home for some type of community placement. Family members are virtually the only constant figures in the mentally retarded person's life and only a family has a broad enough perspective to take in the total picture of service needs. Blacker, J., et al., *Toward Meaningful Family Involvement in Out-of-Home Placement Settings*, Mental Retardation, Vol. 30, No. 1, 35-43 (1992).

[5]*See also:* Buchan, L., et al., *Working with families of children with special needs: The parent adviser scheme.* Child Care, Health and Development, March-April Vol. 14(2), 81-91 (1988); Castellani, P. J., et al., *Availability and accessibility of family support services.* Mental Retardation, Vol. 24(2), 71-79 (1986); Davidson, P., et al., *Planning and implementing comprehensive crisis intervention for people with developmental disabilities,* in J. Levy, P. Levy and B. Nevin (Eds), Strengthening Families: New Directions in Providing Services to People with Developmental Disabilities and Their Families. N.Y.: YAI Press, 203-210.

A legal guardian of a mentally retarded person assumes statutory duties to provide for his ward's care, comfort and maintenance and to arrange for such educational, social, vocational and rehabilitation services as will assist the ward in the development of maximum self-reliance and independence. KRS 387.660(2). The guardian is required to report to the state district court concerning his ward and his activities as guardian. KRS 387.670(3). The role of legal guardian often falls upon the mentally retarded person's parents, and these legal duties supplement the parent's traditional high moral duties.

(2) Procedures utilized.

Under *Parham*, the risk of deprivation of the foregoing interests through the procedures used, as well as the probable value of any additional or substitute procedures must be weighed in the balancing process. The procedures utilized in CHR's voluntary admission process were set forth in the Statement of the Case. However, since CHR's voluntary admission procedure could only be instituted by a legal guardian, the Court must also examine the procedures used in the appointment of a guardian.

The appointment of guardians for disabled persons in Kentucky is governed by KRS 387.500, *et seq.* The appointment process requires that a petition be filed in the state district court of the county in which the respondent resides. KRS 387.520. An attorney is appointed to represent the respondent. KRS 387.560. Prior to any hearing,

a court-appointed interdisciplinary evaluation team composed of a physician, psychologist and social worker prepare a comprehensive evaluation of the respondent for the court. KRS 387.540.

The respondent has a right to a jury trial at which the respondent may present evidence and confront all witnesses. KRS 387.570. The burden of proving that the respondent is disabled in managing his personal affairs and financial resources rests upon the Commonwealth and the evidence must satisfy the "clear and convincing" standard. KRS 387.570.

At the conclusion of the proof, the jury retires to determine whether the respondent is disabled, partially disabled or not disabled in relation to the management of his personal affairs and in relation to the management of his financial affairs. KRS 387.580. Upon a finding of disability, the district court may appoint a general guardian or a limited guardian whose power is limited to the extent of the respondent's disability. KRS 387.590.

A guardianship proceeding is not a *pro forma* matter. The hearings are adversarial in nature and pit the parent seeking a judicial declaration of mental disability against his child and the child's appointed counsel. (R. 213, pp. 30-33).

After a judicial determination is made regarding guardianship, the procedure for admission to one of CHR's ICF/MR's follows the medical model previously described herein. The application and accompanying material describing the previous efforts to provide habilitative services within the home and community are reviewed by professionals within CHR who are familiar with mental retardation and the services available at CHR's facilities. These

qualified professionals make the determination whether to permit the mentally retarded person to be admitted to an ICF/MR.

After admission to an ICF/MR, the facility staff responsible for treatment are under a continuing duty to evaluate the mentally retarded person's condition to determine whether continued residential placement is necessary. (R. 36, p. 30). The staff conduct resident reviews on a monthly and quarterly basis and hold interdisciplinary team staffings for each resident annually to assess each individual's need for continued residential placement. (R. 36, p. 30). The staff may be subject to civil liability under 42 U.S.C. § 1983 for continuing to retain a resident once a less restrictive setting becomes appropriate. *See Clark* v, *Cohen*, 613 F.Supp. 684 (M.D. Pa. 1985), aff'd 794 F.2d 79 (3rd Cir. 1986), *cert den.*, 107 S.Ct. 459 (1986).

(3) Interests of the Commonwealth of Kentucky.

Kentucky, like all States, as an undeniable *parens patriae* interest in providing necessary habilitation services to the mentally retarded. These services are expensive and compete for funding with other worthwhile services in an austere state budget. Kentucky, like all States, has invested substantial state and federal funds in the construction of facilities, employment of professional personnel, purchase of equipment and the development of programs to provide needed and beneficial habilitative services to the mentally retarded. Thus, Kentucky has a genuine interest in the allocation of priority to the diagnosis of mental retardation and provision of necessary habilitation services rather than the provision of additional procedures before its administration of such services. *See Parham* v, *J. R.*, 442 U. S. at 605.

The time and expense of having physicians, psychologists, occupational therapists, social workers and other mental retardation professionals prepare for and appear in the courtroom in every case involving CHR's provision of habilitation services to the mentally retarded directly distracts from the provision of habilitation services and is of little, if any, benefit to those who seek such services through CHR's ICF/MR facilities.

Kentucky also has a financial interest in the allocation of its scare judicial resources, including prosecutorial resources and the public's payment of fees for counsel and expert witnesses for indigent respondents in involuntary hospitalization proceedings.

B. Balancing the *Parham* factors.

Like the situation presented in *Parham* v, *J. R.*, the questions presented when a guardian finds it necessary to seek habilitation services for his mentally retarded ward through one of CHR's ICF/MR facilities are essentially, if not overwhelmingly, medical in character. The issues are whether the ward is mentally retarded and whether he can benefit from the available habilitation services which CHR can provide. *See* 442 U. S. at 609.

The supposed protections of an adversary judicial proceeding to determine the appropriateness of such medical decisions for the provision of habilitation services on an inpatient basis may be more illusory than real. 442 U. S. at 609. There is no reason to believe that lay jurors are more adept in answering these medical questions than trained medical and mental retardation professionals, or that the former can reach an informed decision on these questions more economically than the latter. *See* 442 U. S. at 612.

Moreover, repeated adversarial proceedings pitting the ward against his guardian and parent can be detrimental to both parties. *See* 442 U. S. 610; (R. 231, pp. 30-33; 37-40). Parents of the mentally retarded understandably often feel guilty because they are not physically and psychologically equipped to provide for their child's medical and habilitative needs - needs which generally increase as the mentally retarded child grows older and the parents' abilities diminish. (R. 213, pp. 41-42).

The barriers imposed by the decisions below to guardians and parents seeking necessary habilitative treatment and services for their wards and children unnecessarily prevent mentally retarded persons from receiving needed services in a timely and cost-effective fashion and may prevent them from receiving such services at all. These barriers may also strain unnecessarily the most important and permanent relationship the mentally retarded will ever know.

The courts below distinguished this case from *Parham* on the ground that the Doe class members have reached the age of majority and are not subject to the same degree of parental control present in *Parham* and *Institutionalized Juveniles*. CHR respectfully submits that the interest of parents in the health and welfare of their mentally retarded children does not cease when these children become chronological adults. When that natural parental interest is supplemented by the mandatory duties of a legal guardian, the interests of the parent/guardian are greater than that presented by the parents in *Parham* and *Institutionalized Juveniles*. Moreover, *Parham* held that the interests and duties of a legal guardian alone were sufficient to tilt the balancing of interests toward the medical model. 442 U. S. at 618-620.

CHR respectfully submits that a proper balancing of the interests involved in this litigation weighs heavily in favor of permitting the legal guardian of a mentally retarded adult to substitute his consent for that of his ward to the ward's voluntary admission to a CHR operated ICF/MR for necessary habilitation services provided such admission is determined necessary and beneficial for the ward by trained medical professionals.

2. Kentucky's utilization of the "clear and convincing" standard of evidence for the involuntary hospitalization of the mentally retarded and the "beyond a reasonable doubt" standard for involuntary hospitalization of the mentally ill does not violate Equal Protection.

Although *Addington* v, *Texas*, 441 U. S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) holds that the "clear and convincing" standard of evidence is required by the Fourteenth Amendment in civil proceedings to involuntarily commit an individual to a state mental hospital for an indeterminate period of time, the Kentucky General Assembly adopted the "beyond a reasonable doubt" standard of evidence for such proceedings in Kentucky. KRS 202A.076(2).

Prior to the adoption of 1990 Kentucky Acts, Chapter 147 (House Bill 511), KRS 202B.050 incorporated by reference the involuntary hospitalization proceedings described in KRS Chapter 202A for involuntary hospitalization proceedings for the mentally retarded, including the "beyond a reasonable doubt" standard of evidence.

The 1990 General Assembly made massive revisions in KRS Chapter 202B which included adoption of specified judicial involuntary hospitalization procedures predicated upon the "clear and convincing" standard of evidence. Section 15(2) of House Bill 511. An effort was made by the

General Assembly to amend the standard of evidence for involuntary hospitalization procedures for the mentally ill; however, that legislation did not become law.

As a result of the 1990 legislation, Kentucky now has different standards of evidence for the involuntary hospitalization of the mentally retarded and the mentally ill which the courts below found to be in violation of Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment prohibits a State from denying any person within its jurisdiction the "equal protection" of the law. This prohibition is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne* v, *Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statue is rationally related to a legitimate state interest. *Cleburne*, 473 U. S. at 440.

Mental retardation is a condition that the government may legitimately take into account in a wide range of decisions. *Cleburne*, 473 U. S. at 446. Legislation which distinguishes between the mentally retarded and others is permissible provided the legislation is rationally related to a legitimate government purpose. *Ibid.*

A. The state's previous adoption of an unreasonable standard of evidence for involuntary hospitalization of the mentally ill should not now prejudice the mentally retarded.

In *Addington* v, *Texas*, supra, this Court did more than simply set the "clear and convincing" standard of evidence as the constitutionally permissible floor for involuntary hospitalization, it also determined that the "clear and con-

vincing" standard was the correct standard. Indeed, the Court concluded that the "beyond a reasonable doubt" standard was "inappropriate" in civil commitment proceedings. 441 U. S. at 417. This Court found the criminal law standard to be inappropriate because it was likely to impose a burden the state could not meet and thereby erect an unreasonable barrier to needed medical treatment. 441 at U. S. 417. *Addington* acknowledged that some states, including Kentucky, had already adopted the criminal law standard for involuntary hospitalization proceedings and expressed doubt as to whether this standard could be adapted to the needs of the states. 441 U. S. 417-418.

Given that Kentucky has improvidently applied an inappropriate standard of evidence that unreasonably prevents the mentally ill from receiving necessary medical treatment, there is no sound reason to compound that mistake by applying the same inappropriate standard of evidence to the provision of necessary habilitation services to the mentally retarded.

The difference in the standards of evidence imposes no burden upon the mentally retarded. Rather, it simply frees them from a burden which was imposed unnecessarily, and perhaps unwisely, upon the mentally ill.

B. Sufficient differences exist between the mentally retarded and the mentally ill to constitutionally permit the State to utilize the "clear and convincing" standard of evidence for involuntary hospitalization of the mentally retarded while utilizing the "beyond a reasonable doubt" standard for involuntary hospitalization of the mentally ill.

In *Kremens* v, *Bartley*, 431 U. S. 119, 97 S.Ct. 1709, 54 L.Ed.2d 184 (1977), this Court suggested that there are significant differences between the mentally ill and the

mentally retarded that are clearly relevant for purposes of reviewing procedures by which they are admitted to state facilities. The issue sought to be addressed in *Kremens* involved the procedures by which a State admitted 13-18 year olds to its mental health facilities. During the pendency of the litigation, the State repealed the statutes upon which the claims had been based except as those statutes applied to the mentally retarded and children under age 13. This Court held that the claims of the named class representatives were moot and remanded the action for further proceedings with the instruction to the District Court that "careful attention must be paid to the differences between the mentally ill and the mentally retarded" 431 U. S. at 135-136.

CHR has attempted to demonstrate throughout this litigation that there are significant differences between the mentally ill and the mentally retarded which provide a rational basis for the General Assembly's adoption of different standards of evidence for their involuntary hospitalization.

Mental retardation is a permanent condition — it cannot be cured or treated. (R. 69, pp. 29-30). Persons suffering from mental retardation are in need of special and continuing care called habilitation their entire lives.

Mental illness, unlike mental retardation, can be and usually is successfully treated with modern medications. Most mentally ill persons lead productive lives in society with the symptoms of their illness controlled or suppressed through medication.

Involuntary confinement to a state mental hospital has been found to engender adverse social consequences to the committed individual. *Addington*, 441 U.S. at 425-426.

Involuntary psychiatric treatment and mandatory behavior modification treatment can have a stigmatizing effect. *Vitek* v, *Jones*, 445 U. S. 480, 495, 100 S.Ct. 1254, 1265, 63 L.Ed.2d 552 (1980).

There has been no showing at any point in these proceedings of any stigma or other adverse social consequence associated with admission of a mentally retarded person to one of CHR's ICF/MR facilities. CHR's facilities bear little resemblance to mental hospitals. Given the nature of mental retardation, adverse social consequences are more likely to occur if the mentally retarded person fails to receive adequate habilitation services at necessary intervals.

Involuntary hospitalization of the mentally ill is an unplanned sporadic occurrence which removes an individual from society, brings his illness under control through appropriate diagnosis and administration of psychotropic medications which alter the patient's thought process, and then permits the patient to return back to society.

A mentally retarded person's need for habilitation services is not sporadic and need not be unplanned. Mental retardation is not subject to the same subtleties in diagnosis as mental illness and rarely involves treatment through psychotropic medications.

CHR respectfully submits that the differences between the mentally retarded and the mentally ill described above provide a rational basis for Kentucky's adoption of different standards of evidence for their involuntary hospitalization.

3. Involuntary hospitalization procedures which permit a mentally retarded person's immediate family or legal guardian to participate in the proceedings as though a party therein do not deprive the mentally retarded person to his right to Due Process of Law.

House Bill 511 contains certain sections that permit a mentally retarded person's legal guardian or immediate family member to participate in the involuntary commitment process as if he or she were a party to the proceeding.

Section 13 provides that the respondent in an involuntary commitment proceeding, or his parents or guardian, may employ a qualified expert witness whose testimony and findings shall be admissible at the hearing:

> A qualified mental retardation professional retained by the respondent, or the respondent's parent or guardian, at the expense of the parent or guardian, shall be permitted to witness and participate in any examination of the respondent and may submit findings, if any, to the Court. KRS 202B.140.

Section 15(3) permits the respondent's legal guardian and immediate family members to participate in the proceedings in all respects as parties:

> Guardians and immediate family members of the respondent shall be allowed to attend all hearings, conferences or similar proceedings; may be represented by private counsel, if desired; may participate in the hearings or conferences as if a party to the proceedings; may cross-examine witnesses if desired; and shall have standing to appeal any adverse decision. KRS 202B.160(3).

Section 22 describes the process for appeal from decisions made in involuntary commitment proceedings and also provides that the respondent's guardian may take an appeal:

> Appeals from the final orders or judgments of the District Court made and entered in proceedings under this chapter shall be taken in the manner as other appeals from District Court to Circuit Court. Appeals

> may be taken by the Commonwealth, the individual who is subject to the proceedings or the individual's guardian, limited guardian, or other authorized representative. This appeal shall be advanced on the Circuit Court docket without motion or notice. KRS 202B.230.

The District Court and the Sixth Circuit held that Sections 13, 15(3) and 22 of the Act violated Due Process because these Sections imposed an undue burden upon the mentally retarded by permitting "third parties" to participate in the commitment proceedings. CHR respectfully submits that the legal guardians and immediate family of a mentally retarded person are not "third parties" to an involuntary commitment proceeding and their participation in these proceedings does not impose an undue burden upon the retarded.

Since mental retardation is a permanent condition, reaching the age of majority does not mean emancipation for the mentally retarded person. He or she will remain dependent upon others for the balance of his or her life. The degree of dependence will depend upon the degree of retardation and the availability of continuous habilitation services.

As described previously herein, the role of care-giver or care-provider has traditionally fallen upon the mentally retarded person's parents or immediate family. When no parent or family member is willing or available, that role may be filled by a court-appointed guardian who is charged with the statutory duty of determining his ward's care, comfort, maintenance and arrangements for such educational, social, vocational and rehabilitation services as will assist the ward in developing maximum self-reliance and independence. KRS 387.660. The situation of Tracy Horton provides a fair example.

Tracy Horton was born on April 27, 1965. (R. 213, p. 8). Tracy was diagnosed as being profoundly retarded and having cerebral palsy at one year of age. (R. 213, p. 10).

Tracy has never been able to speak or communicate with her parents and they do not know whether she has the ability to hear. (R. 213, p. 9). Despite Tracy's physical and mental limitations, Tracy's parents accepted her "as a special package of joy that we were going to raise as best we could." (R. 213, p. 10).

When she was a small child, Tracy could pull herself to a standing position at the coffee table, but as she grew older she lost the ability to stand at all. (R. 213, pp. 7-8). Tracy's parents and their neighbors and friends gave Tracy a type of physical therapy known as "patterning" for hours at a time to help Tracy learn to walk, but no change in her condition was noted after years of effort. (R. 213, pp. 12-13).

Tracy's parents kept her enrolled in the day programs available for retarded children so that she might be stimulated by the exercise and social aspects of these programs. (R. 213, pp. 14-15).

Tracy has no self-help skills at all. When Tracy lived at home, her parents got her up in the morning, diapered her, cleaned her, fed her breakfast one spoonful at a time, dressed her, and strapped her into her wheelchair to wait for the school bus. (R. 213, p. 16). If there was no school, her mother would feed her, change her diapers, talk to her and let her watch television. (R. 213, p. 17).

Tracy's major health problem was frequent bouts of pneumonia. (R. 213, p. 18). Tracy had bedsores for years which began to worsen severely as she neared twenty-one years of age. (R. 213, p. 20). Her frequent cough became more croupy and her limbs began to swell. Tracy's doctors described her condition as congestive heart failure. (R. 213, p. 21).

Tracy's father, Thomas Horton, is the administrator of the Episcopal Church Home in Louisville, Kentucky. (R. 213, p. 7). Despite 25 years of experience in long-term

health care, Tracy's parents realized that they could not continue to provide for Tracy's needs at home. (R. 213, pp. 7 and 22). Tracy was enrolled in a structured day program, being treated by a doctor and cared for around the clock by family, but her condition was continuing to deteriorate. (R. 213, pp. 21-22). After consultation with the local comprehensive care center, Tracy's parents began the process of obtaining her admission to Hazelwood ICF-MR. (R. 213, pp. 27-28).

Tracy's parents instituted guardianship proceedings to obtain the power to voluntarily admit their daughter to Hazelwood. These proceedings led to the appointment of Tracy's mother as her legal guardian. (R. 213, pp. 31-33). After the District Court's initial preliminary injunction below, Tracy's parents were also required to institute involuntary commitment proceedings against Tracy to obtain her admission to Hazelwood. (R. 213, pp. 37-38).

If these judicial proceedings had resulted in a determination that Tracy did not meet the criteria for admission to Hazelwood[6], it was Tracy's parents — not CHR, Secretary Heller, Tracy's appointed counsel, the Jefferson District Court, the U. S. District Court Judge, Samuel Doe or his attorneys — who would have faced the very real and immediate crisis of meeting Tracy's health and habilitation needs. Tracy's parents were not "third parties" to the

[6]The initial state court involuntary hospitalization proceedings resulted in Tracy's commitment to Hazelwood ICF/MR. (R. 213, p. 39). However, a subsequent jury trial resulted in a determination that Tracy no longer satisfied the criteria for involuntary admission to an ICF/MR. (R. 213, p. 53). The Secretary's refusal to forcibly remove Tracy from Hazelwood following this jury determination and the dismissal, for lack of standing, of her guardian's appeal prompted Doe's motion to hold the Secretary of CHR in contempt below. (R. 167). The motion for contempt was overruled. (R. 178).

commitment proceeding, their interests were every bit as legitimate as the Commonwealth's.

House Bill 511 gives the parents or guardian of a mentally retarded person the opportunity to make certain that all permissible, relevant and available evidence bearing upon the issue of whether his child or ward will be involuntarily compelled to receive necessary habilitation services at one of CHR's ICF/MR facilities is submitted to the independent decision-maker and to seek review of any decision which is not consistent with that evidence. Participation of the mentally retarded person's parents or guardian does not impact upon any of the procedures required by the Sixth Circuit in *Doe* v, *Austin*, 848 F.2d 1386 at 1393-1394 (6th Cir. 1988).

This Court has previously recognized the rights of parents and legal guardians to participate in proceedings involving the welfare of their children and wards. *See In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). CHR respectfully submits that the participation of immediate family members and legal guardians of the mentally retarded in proceedings for compelling involuntary provision of habilitative services does not offend Due Process.

4. Sufficient differences exist between the mentally retarded and the mentally ill to constitutionally permit a State to adopt procedures which permit the immediate family and legal guardians of mentally retarded persons to participate in involuntary hospitalization proceedings for the mentally retarded as if parties thereto without adopting procedures for the immediate family and legal guardians of mentally ill persons to participate as parties in involuntary hospitalization proceedings for the mentally ill.

The courts below found that permitting other interested parties to participate in the involuntary commitment proceedings for the mentally retarded imposed a burden on the mentally retarded that was not imposed upon the

mentally ill. There has been no showing how increasing the likelihood that the independent decision-maker will receive all permissible, available and relevant evidence before deciding whether a mentally retarded person can participate in the Cabinet's habilitation programs imposes a burden upon the retarded. If anything, it would appear that the mentally retarded enjoy an advantage of the increased likelihood that the decision regarding their care needs will be based upon the appropriate evidence.

To the extent the additional protections provided to the mentally retarded by permitting other interested parties to participate in their commitment proceedings do cause the mentally retarded to suffer a burden, CHR respectfully submits that the differences between the mentally retarded and the mentally ill set forth in the previous argument provide a rational basis for the different treatment.

CONCLUSION

For the reasons set forth herein, the Opinions of the Court of Appeals which unnecessarily burden the mentally retarded, their families, legal guardians, and the State agencies attempting to provide the retarded with necessary beneficial habilitation services should be reversed.

Respectfully submitted,

WILLIAM K. MOORE
P. O. Box 4217
Midway, KY 40347
Telephone (606) 846-4431

MASTIN CHILDERS, II, Commissioner
EDWARD D. KLATTE
CHARLES P. LAWRENCE
Department of Law
Cabinet for Human Resources
275 East Main Street—4 West
Frankfort, KY 40621
Telephone: (502) 564-7900

APPENDIX

KENTUCKY REVISED STATUTES

202B.010. Definitions. — As used in this chapter, unless the context otherwise requires:

(1) "Interdisciplinary team" means the group of persons responsible for the diagnosis, evaluation and individualized program planning and service implementation for the resident. The team is composed of a physician, a psychologist, a registered nurse, a social worker and other professionals, at least one (1) of whom is a qualified mental health professional, and may include the resident, the resident's family, or the guardian;

(2) "Mentally retarded person" means a person with significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period;

(3) "Mental retardation residential treatment center" means a residential treatment facility approved by the department for the evaluation, care and treatment of mentally retarded persons;

(4) "Qualified mental retardation professional" means:

(a) A psychologist licensed under the provisions of KRS Chapter 319, who has either one (1) year of specialized training for work with mentally retarded persons or one (1) year of clinical experience with mentally retarded persons;

(b) A licensed registered nurse with a master's degree in psychiatric nursing from an accredited institution, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one (1) year of specialized training for work with mentally retarded persons;

(c) A certified social worker licensed under the provisions of KRS Chapter 335 or accredited by the academy of

certified social workers, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one (1) year of specialized training for work with mentally retarded persons;

(d) A psychologist with a master's degree from an accredited institution who has been awarded a certificate of qualification by the Kentucky board of examiners of psychologists under the provisions of KRS Chapter 319, with two (2) years of clinical experience. At least one (1) year of such experience shall be with mentally retarded persons, or he shall have one (1) year of specialized training for work with mentally retarded persons; and

(e) Other professional persons with similar training and experience who are qualified according to regulations promulgated by the secretary to participate in seventy-two (72) hour involuntary hospitalization procedures under this chapter;

(5) "Resident" means a person under care or treatment in a mental retardation residential treatment center pursuant to the provisions of this chapter; and

(6) All terms defined in KRS Chapter 202A shall have the same meaning when used in this chapter. (Enact. Acts 1976, ch. 328, § 2; 1986, ch. 79, § 1, effective March 6, 1986.)

202B.020. Hospitalization for mentally retarded — Court examination. — Hospitalization for the care and treatment of mentally retarded persons shall be provided by the same procedures as hospitalization of mentally ill persons as provided in KRS Chapters 387 and 210 and as set forth in KRS 202A.021, 202A.231 and 202A.201, except that:

(1) When the court appoints qualified persons to examine an allegedly mentally retarded respondent such

persons shall, where possible, have made a special study of mental retardation;

(2) A qualified mental retardation professional may be substituted for one but not both physicians when certification is required for involuntary hospitalization under this chapter; and

(3) All functions of a hospital as set forth in KRS Chapter 202A may be carried out by a mental retardation residential treatment center. (Enact. Acts 1976, ch. 328, § 3; 1982, ch. 141, § 36, effective July 1, 1982; 1982, ch. 445, § 36, effective July 1, 1982.)

202B.030. Involuntary hospitalization. — When mentally retarded individuals are involuntarily hospitalized under this chapter, the cabinet may place them in a mental retardation residential treatment center. No mentally retarded person may be involuntarily placed in a hospital without the consent of the secretary, except when the determination of concurrent mental illness is made under the provisions of KRS chapter 202A. No mentally retarded person or juvenile may be involuntarily admitted to a hospital or mental retardation residential treatment center when the cabinet determines that appropriate programs and space are not available. (Enact. Acts 1976, ch. 328, § 4.)

202B.040. Involuntary commitment of alleged mentally retarded person — Required determination — When application not considered involuntary commitment. — When a person who is alleged to be mentally retarded is involuntarily committed, there shall be a determination that:

(1) He is a mentally retarded person;

(2) He presents a danger or a threat of danger to self or others;

(3) The least restrictive alternative mode of treatment requires placement in a hospital or mental retardation residential treatment center;

(4) Treatment that can reasonably benefit the individual is available in the hospital or mental retardation residential treatment center; and

(5) The application by parents or guardians for placement for their retarded family member or ward in any mental retardation treatment center shall not be considered an involuntary commitment under this section provided the retarded family member's application has been evaluated by an interdisciplinary team as defined in KRS 202B.010 and the subsequent admission fully complies with the provisions of KRS Chapter 202B. (Enact. Acts 1976, ch. 328, § 5; 1982, ch. 445, § 37, effective July 1, 1982; 1986, ch. 79, § 2, effective March 6, 1986.)

202B.045. Requirements for admission — Discharge planning. — (1) Admission:

(a) Patients shall be admitted only upon the approval of a physician. The facility shall admit only persons who have a physical or mental condition which requires developmental nursing services and a planned program of active treatment;

(b) The interdisciplinary team shall"

1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive facts; and

2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings;

(c) If admission is not the best plan but the individual must be admitted nevertheless, the facility shall clearly

acknowledge that the admission is inappropriate and initiate plans to actively explore alternatives;

(d) Before admission, the resident and a responsible member of his family or committee shall be informed in writing of the established policies of the facility and fees, reimbursement, visitation rights during serious illness, visiting hours, type of diets offered and services offered; and

(e) The facility shall provide and maintain a system for identifying each resident's personal property and facilities for safekeeping of his declared valuables. Each resident's clothing and other property shall be reserved for his own use.

(2) Discharge planning. Prior to discharge the facility shall have a postinstitutional plan which identifies the residential setting and support services which would enable the resident to live in a less restrictive alternative to the current setting. Before a resident is released, the facility shall:

(a) Offer counseling to parents or guardians who request the release of a resident concerning the advantages and disadvantages of the release;

(b) Plan for release of the resident, to assure that appropriate services are available in the resident's new environment, including protective supervision and other followup services; and

(c) Prepare and place in the resident's record a summary of findings, progress, and plans. (Enact. Acts 1986, ch. 79, § 4, effective March 6, 1986.)

202B.050. Rights guaranteed. — All rights guaranteed by KRS Chapters 202A (other than those rights enumerated in KRS 202A.026 and 202A.051) and Chapter 210 to mentally ill persons shall apply to mentally retarded per-

sons. (Enact. Acts 1976, ch. 328, § 6; 1982, ch. 141, § 37, effective July 1, 1982; 1986, ch. 79, § 3, effective March 6, 1986.)

202B.060. Rights of mentally retarded — Secretary to adopt regulations. — The secretary shall adopt rules and regulations for the proper administration and enforcement of this chapter. Such rules and regulations shall include but shall not be limited to:

(1) Rights of mentally retarded residents and their families to be adequately informed as to the individual treatment program of the resident;

(2) Rights of residents and their families to assist in the planning of the treatment program of the resident;

(3) Rights of residents and their families under certain conditions to refuse treatment offered to the resident by the hospital or mental retardation residential treatment center;

(4) Rights of residents to maintain, keep and use personal possessions and money;

(5) Rights of residents to meet with friends and relatives;

(6) Rights of residents to receive payment for work performed on behalf of the hospital or mental retardation residential treatment center;

(7) Rights of residents to refuse intrusive treatments, including electroshock or psychosurgery;

(8) Rights of residents to seek relief from participating in their treatment plans;

(9) Rights of residents who are minors to seek relief from actions, approved by their parents or guardians, for or against admission and discharge;

(10) The use of seclusion and other mechanical restraints in hospitals and mental retardation residential treatment centers;

(11) The transfer of residents between hospitals and mental retardation residential treatment centers and between mental retardation residential treatment centers and forensic psychiatric facilities;

(12) The release of residents to less restrictive alternative modes of treatment on convalescent status; and

(13) Provisions for alternative methods for involuntary hospitalization. (Enact. Acts 1976, ch. 328, § 7.)

387.660. Specific powers and duties of guardian. — A guardian of a disabled person shall have the following powers and duties, except as modified by order of the court:

(1) To take custody of the ward and to establish his place of abode within the state, except that, it at any time a guardian places a ward in a licensed residential facility for developmentally disabled persons, the guardian shall, within thirty (30) days of such placement, file with the court notice of the placement, stating with specificity the reasons for such placement, and an interdisciplinary evaluation report detailing the social, psychological, medical or other considerations on which such placement is predicated, a description of the treatment or habilitation programs which will benefit the ward as a result of such placement, and a determination that such placement will provide appropriate treatment in the least restrictive available treatment and residential program. For purposes of this subsection, the interdisciplinary evaluation report may be one performed within two (2) months prior to the placement for purposes of determining whether such placement is necessary and appropriate, or may be an evaluation and assessment provided by the residential facility immediately after placement. Notice to the court shall not be

required where the ward is transferred from one licensed residential facility to another.

(2) To make provision for the ward's care, comfort, and maintenance and arrange for such educational, social, vocational, and rehabilitation services as are appropriate and as will assist the ward in the development of maximum self-reliance and independence.

(3) To give any necessary consent or approval to enable the ward to receive medical or other professional care, counsel, treatment or service, except that a guardian may not consent on behalf of a ward to an abortion, sterilization, psychosurgery, removal of a bodily organ, or amputation of a limb unless the procedure is first approved by order of the court os is necessary, in an emergency situation, to preserve the life or prevent serious impairment of the physical health of the ward.

(4) To act with respect to the ward in a manner which limits the deprivation of civil rights and restricts his personal freedom only to the extent necessary to provide needed care and services to him.

(5) To expend sums from the financial resources of the ward reasonable and necessary to carry out the powers and duties assigned to him by the court and, unless a separate conservator has been appointed, to manage the financial resources of this ward.

If a separate limited conservator or conservator has been appointed for the ward, the expenditure of funds by the limited guardian shall be consistent with the duties assigned to and procedures and policies established by such limited conservator or conservator. Conflicts arising between a limited guardian and a limited conservator or conservator regarding the expenditure of funds which are unable to be otherwise resolved shall be submitted to the court for resolution. (Enact. Acts 1982, ch. 141, § 17, effective July 1, 1982.)

387.670. Annual report of guardian. — (1) A guardian shall file with the court as least annually a verified report stating:

(a) The ward's current mental, physical, and social condition;

(b) The address of every residence of the ward during the reporting period and length of stay at each residence;

(c) A summary of the medical, social, educational, vocational, and other professional services received by the ward during the reporting period;

(d) An outline of the guardian's visits with and activities on behalf of the ward;

(e) A recommendation as to the need for continued guardianship;

(f) A statement signed by the standby guardian, if one has been appointed, that the standby guardian continues to be willing to serve in the event of the death, resignation, removal, or incapacity of the guardian; and

(g) Other information requested by the court or useful in the opinion of the guardian.

(2) For the purpose of filing the report required by subsection (1) of this section, the guardian shall be given access to records pertaining to the ward held by public or private agencies which contain information necessary for the guardian to perform his duties.

(3) The court shall review the report required in subsection (1) of this section and take whatever action it considers necessary to enhance the well-being of the ward.

(4) In addition to the requirements of this section, a guardian shall comply with the reporting requirements of KRS 387.710 unless a separate conservator has been appointed. (Enact. Acts 1982, ch. 141, § 18, effective July 21, 1982.)

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